No. 85-749

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

MICHELLE MARIE W., a minor by and through her Guardian Ad Litem VERLE WILLIAMS, and DONALD MICHAEL RILEY,

*Appellants,*

*v.*

JUDITH ANNE RILEY and RONALD BEARLEY W.,

*Appellees.*

## JURISDICTIONAL STATEMENT

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## QUESTION PRESENTED

Whether section 621 of the California Evidence Code is violative of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution on its face and when applied to deny a child and claiming natural father, who currently enjoy an actual parent child relationship, the opportunity to establish the legal relationship of parent and child.

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OCTOBER TERM, 1985

MICHELLE MARIE W., a minor by and through her Guardian Ad Litem VERLE WILLIAMS, and DONALD MICHAEL RILEY,

*Appellants,*

*v.*

JUDITH ANNE RILEY and RONALD BEARLEY W.,

*Appellees.*

## JURISDICTIONAL STATEMENT

Michelle Marie W. and Donald Michael Riley, the appellants, appeal from the final judgment of the Supreme Court of California, dated August 5, 1985, holding that section 621 of the California Evidence Code, on its face, and as applied in this case, does not violate appellants' rights to due process and equal protection guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. Appellants submit this jurisdictional statement to show that the Supreme Court has jurisdiction of the appeal and that a substantial question is presented.

## OPINIONS BELOW

The opinion of the Supreme Court of California, which appears in the appendix hereto, p. 1a, *infra*, is reported at 39 Cal.3d 354 (1985).

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is not reported in the official reporter. It is reprinted in the appendix hereto, p. 22a, *infra*.

## JURISDICTION

The judgment of the Supreme Court of California, affirming the granting of a motion for summary judgment, was entered on August 5, 1985.

A notice of appeal to this Court was duly filed in the Supreme Court of California on October 22, 1985.

This appeal is being docketed in this Court within 90 days from the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(2). The provisions of 28 U.S.C. sec. 2403(b) may be applicable.

## CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for

the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Evidence Code Section 621:

(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.

(d) The notice of motion for blood tests under subdivison (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(e) The provisions of subdivision (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code or to any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.

(f) The notice of motion for the blood tests pursuant to subdivision (b) shall be supported by a declaration under oath submitted by the moving party stating the factual basis for placing the issue of paternity before the court. This requirement shall not apply to any case pending before the court on September 30, 1980.

(g) The provisions of subdivision (b) shall not apply to any case which has reached final judgment of paternity on September 30, 1980.

California Civil Code Section 7001:

As used in this part, "parent and child relationship" means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

California Civil Code Section 7002:

> The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

California Civil Code Section 7003:

> The parent and child relationship may be established as follows:
>
> (1) Between a child and the natural mother it may be established by proof of her having given birth to the child, or under this part.
>
> (2) Between a child and the natural father it may be established under this part.
>
> (3) Between a child and an adoptive parent it may be established by proof of adoption.

California Civil Code Section 7004:

> (a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following subdivisions:
>
> (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.
>
> (2) Before the child's birth, he and the child's natural mother have attempted to marry each other

by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.

(3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) With his consent, he is named as the child's father on the child's birth certificate, or

(ii) He is obligated to support the child under a written voluntary promise or by court order.

(4) He receives the child into his home and openly holds out the child as his natural child.

(b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise under this section which conflict with each other, the presumption which on the facts is founded on the weightier considerations

of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

California Civil Code Section 7006:

(a) A child, the child's natural mother, or a man presumed to be his father under paragraph (1), (2), or (3) of subdivision (a) of Section 7004, may bring an action as follows:

(1) At any time for the purpose of declaring the existence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004.

(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under paragraph (4) of subdivision (a) of Section 7004.

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child,

the State Department of Social Services the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. The commencement of such an action shall suspend any pending proceeding in connection with the adoption of such child, including a proceeding pursuant to subdivision (b) of Section 7017, until a judgment in the action is final.

(d) Except as to cases coming within the provisions of Section 621 of the Evidence Code, a man not a presumed father may bring an action for the purpose of declaring that he is the natural father of a child having a presumed father under Section 7004, if the mother relinquishes for, consents to, or proposes to relinquish for or consent to, the adoption of the child. Such an action shall be brought within 30 days after the man is served as prescribed in subdivision (f) of Section 7017 with a notice that he is or could be the father of such child or the birth of the child, whichever is later. The commencement of such action shall suspend any pending proceeding in connection with the adoption of such child until a judgment in the action is final.

(e) Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this section.

(f) An action under this section may be brought before the birth of the child.

(g) The district attorney may also bring an action under this section in any case in which he believes that the interests of justice will be served thereby.

California Civil Code Section 7008:

The child may, if under the age of 12 years, and shall, if 12 years of age or older, be made a party to the action. If he is a minor and a party to the action he shall be represented by a guardian ad litem appointed by the court. The natural mother, each man presumed to be the father under Section 7004, and each man alleged to be the natural father, may be made parties and shall be given notice of the action in the manner prescribed in subdivision (f) of Section 7017 and an opportunity to be heard. The court may align the parties.

California Civil Code Section 7010:

(a) The judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes except for actions brought pursuant to Section 270 of the Penal Code.

(b) If the judgment or order of the court is at variance with the child's birth certificate, the court shall order that a new birth certificate be issued as prescribed in Article 6 (commencing with Section 10450) of Chapter 8, of Division 9 of the Health and Safety Code.

(c) The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visita-

tion privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. The judgment or order may direct the father to pay the reasonable expenses of the mother's pregnancy and confinement.

(d) In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, a court enforcing the obligation of support shall consider all relevant facts.

## RAISING THE FEDERAL QUESTION

At the earliest stage of the proceedings below, in response to a motion for summary judgment, the appellants raised the claim that California Evidence Code section 621 is unconstitutional as repugnant to the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *See* Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment, appendix pp. 28a - 40a, *infra*. Summary judgment was granted by the superior court in favor of appellees.

The due process and equal protection challenges were made again on appeal to the Court of Appeal of the State of California, Fourth Appellate District, Division One. The court of appeal agreed with the contention that Evidence Code section 621 as applied to Michelle W. is unconstitutional, under both the Due Process and Equal Protection Clauses of the United States Constitution, and reversed the judgment. See opinion below, pp. 28-29.

The constitutional claims were reiterated by appellants before the California Supreme Court. The California Supreme Court

expressly considered and rejected appellants' constitutional claims and affirmed the judgment of the superior court. See opinion below, pp. 363-365, *infra*.

## STATEMENT OF THE CASE

On March 18, 1981, appellants Donald Riley and Michelle W., a minor by and through her guardian ad litem, filed a complaint to establish paternity alleging Donald Riley is Michelle's natural father and seeking a declaration of his paternity. Michelle's mother and Ronald W., her mother's ex husband, were named as defendants in the action. A guardian ad litem had been appointed to insure procedural safeguards. The guardian appointed had been a friend of both sides to the litigation.

On May 28, 1981 a motion for summary judgment was filed by appellee Ronald W. contending that California Evidence Code section 621 conclusively established his paternity of Michelle. In response to the motion, appellants argued that section 621 is unconstitutional on its face and as applied to them under the Due Process clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Summary judgment was granted in favor of the appellee Ronald W. and appellants appealed to the Court of Appeal of the State of California, Fourth Appellate District, Division One.

Appellants reiterated their constitutional challenges in the court of appeal and the court agreed with the contention that, as applied to Michelle, section 621 violated her rights to equal protection and due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The court of appeal reversed the judgment below.

The constitutional arguments were presented to the California Supreme Court in appellants' answer to petition for hearing. The California Supreme Court expressly considered and rejected

appellants' constitutional challenges to section 621 and affirmed the judgment of the superior court.

Although in dispute, the relevant facts are summarized in the opinion of the court of appeal as follows:

> Judith R. and Ronald W. were married in 1965 and lived together continuously for more than 13 years before separating in 1978. Judith gave birth to Michelle on October 25, 1974. Judith and Ronald W. were living together at the time of Michelle's birth and Ronald W. was neither impotent nor sterile. The marriage was dissolved by final judgment entered September 4, 1979.
>
> Beginning in September 1973 and continuing through the final six years of Judith's marriage to Ronald W., Judith and Donald R. regularly engaged in sexual relations. By declaration, Judith said Michelle was conceived during her relations with Donald R. and he is Michelle's natural father. In 1980, Donald R. and Judith were married. Michelle lives with the Donald R.'s as provided for by the 1979 dissolution order granting Judith custody of Michelle. The order also grants Ronald W. visitation rights, which he has exercised regularly since the divorce.

See opinion below, p. 26.

## THE QUESTION IS SUBSTANTIAL

The importance of the parent child relationship has been recognized throughout history. The effects of the relationship upon the development of the child and the psychological well-being of the parent have been considered and discussed extensively

by professionals in the field including psychologists, sociologists, clergymen, and educators. As in all manner of human affairs, when disputes arise concerning rights and obligations flowing from the parent child relationship, the legal system is called upon to arbitrate and is expected to provide a just resolution to the problem.

In response, legislators and judges, operating at times outside their area of expertise, have endeavored to provide rules and procedures designed to further the interests of society in general. Overall, the legal system has established parental rights that are comprehensive and operate against the state, third parties and the child. Additionally, legal obligations have been imposed upon parents. These rights and obligations are enforceable by and against only one whom the law recognizes as a "parent."

Recently this Court has been called upon to address the question of who is entitled to legal recognition of parental status in the context of unwed fathers. *Stanley v. Illinois*, 405 U.S. 645 (1971); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robinson*, 463 U.S. 248 (1983). The instant case presents a novel question concerning constitutional protection of the parent child relationship. Here the parties have been prevented from establishing a legal parent child relationship paralleling their biological and actual relationships, as the result of a presumption of paternity that operates to conclusively establish paternity in the mother's ex husband. In addition, contrary to the belief of the court, contact with the ex husband had not been regular.

The presumption that a child born during marriage is legitimate has been universally accepted in the United States. Comment, *California's Conclusive Presumption of Legitimacy: Jackson v. Jackson and Evidence Code Section 621*, 19 Hastings L.J. 963, 964 (1968). However, the trend has been away from a conclusive presumption and courts are not generally agreed that countervailing evidence may shatter the presumption where common sense

and reason are outraged by a holding it abides. Comment, *California's Conclusive Presumption of Legitimacy: Its Legal Effect and its Questionable Constitutionality*, 35 S.Cal. L.Rev. 437, 439 (1962). In many states where the presumption is rebuttable, limits have been placed on a party's ability to rebut the presumption.[1] The constitutional implications of such limitations have been addressed by at least two state supreme courts that have reached different conclusions, California and Colorado. *Compare, R.McG. v. J.W.*, 615 P.2d 666 (Colo. 1980), *with* the decision of the California Supreme Court below, 39 Cal.3d 354.

In California the presumption is codified in Evidence Code section 621. Under section 621 once the underlying facts are established the presumption is conclusive unless rebutted by the husband or the mother within two years of the child's birth. The presumption may not be rebutted by the child or a claiming natural father. When given conclusive effect the presumption operates to preclude the establishment of a legal parent child relationship between a child and his or her biological father.

In Colorado the presumption is codified in section 19-6-107 of C.R.S.1973 (1978 Repl. Vol. 8). Under this section a claiming natural father is denied standing to seek a determination of his paternity of a child born to the mother while she was married to another. The mother, child, and husband, however, are given the right to rebut the presumption within five years of the child's birth.

Scrutinizing nearly identical statutory provisions, the courts of California and Colorado have reached contrary conclusions concerning constitutional challenges brought under the United States Constitution. The Colorado statute was found to deprive a claiming natural father of equal protection by permitting the mother to rebut the presumption while denying the right to the natural father. *R. McG. v. J.W., supra*, 615 P.2d at 671. This position

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[1]See Annot., *Who May Dispute Legitimacy of Child*, 90 A.L.R.3d 1032 (1970).

was rejected in California where the supreme court determined a similar statute does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See opinion below, 35 Cal.3d at 365. As a result of this decision by the California Supreme Court, appellants have been deprived of the right to establish a legal parent child relationship based upon the biological and actual parent child relationships.

The legal relationship of parent and child does not always follow the biological relationship, and the law is replete with instances where a biological parent is not entitled to legal recognition of his status as a parent. However, in view of the natural source of affection and identity created by the bond of blood, and the importance of legal recognition of the relationship, the state's refusal to acknowledge this relationship should be grounded upon sound public policy considerations. California Evidence Code section 621 is not supported by such considerations.

Various policy considerations have been cited in favor of a presumption of paternity such as that set forth in California Evidence Code section 621. In California it has been noted: "The purpose underlying the statutory presumption . . . is to determine the legal father, to achieve certain social policies upholding the integrity of the family [citation], to protect the child from the stigma of illegitimacy [citation], or to protect the child's welfare and to give the father a child and to keep the child off the state's welfare roll." *County of San Diego v. Brown*, 80 Cal.App.3d 297, 303, 145 Cal.Rptr. 483 (1978). While frequently reiterated, none of these policy considerations justify a conclusive presumption of paternity in light of the legal, scientific, and social climate existing today.

Older California cases emphasized the impossibility of definite identification of the father. *See, e.g. Estate of McNamara*, 181 Cal. 82, 96, 183 P. 552 (1919). Originally the section was tailored to this consideration as the presumption did not apply where it could positively be established that the husband could not have

fathered the child. In California the presumption has never applied when the parties were not cohabiting, or where the husband was impotent. The latter exception was extended in 1954 to include sterility. *Hughes v. Hughes*, 125 Cal.App.2d 781, 27 P.2d 172 (1954). However, the presumption has not been altered since that time to extend the exception to include situations where scientific tests determine the impossibility of the husband's paternity. In view of recent advancements in scientific testing techniques,[2] the continued validity of this policy consideration is questionable.

The current version of Evidence Code section 621 similarly does not further the purpose of maintaining the integrity of the family unit. The section permits both the mother and her husband separately to undo the state's interest in preserving family stability by seeking both a declaration of non-paternity in the presumed father and a declaration of paternity in the non-family natural father. The right to rebut the presumption is not tied in any manner to the actual existence or nonexistence of the original family unit.

Fear of imposing the stigma of illegitimacy on a child has often been cited in support of section 621. *See, Estate of McNamara, supra*, 181 Cal. 82. However recent decisions of this Court have established that legitimate and illegitimate children are legally equal in most areas of the law. *See, e.g. Gomez v. Perez*, 409 U.S. 535 (1973). In view of these decisions reflecting changing social mores, the continued validity of this policy consideration has been questioned. *See* Comment 35 S.Cal. L.Rev. 437, 465-66. Furthermore, California has by statute abolished the distinction between legitimate and illegitimate children. *See* California Civil Code sections 7001 and 7002. Even if this policy consideration had continued validity today, section 621 is not tailored to further it. The section permits a husband to establish that he is not the child's father while denying the natural father the opportunity to establish he is the child's father.

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[2]See Comment, *Cutchember v. Payne: Approaching Perfection in Paternity Testing*, 34 Cath.U.L.Rev. 227 (1984).

Similarly the section does not further the asserted purpose of relieving a potential financial burden on the state for the child's support. Clearly a claiming natural father seeking a determination of paternity is ready and willing to assume responsibility for the child while a husband seeking a determination he is not the child's father is seeking to escape responsibility. Yet the husband is permitted to rebut the presumption while the natural father is not.

Policy considerations which may once have justified a conclusive presumption of paternity based upon marriage have lost considerable vitality as a result of cultural and scientific changes over the years. Attempting to respond to these changes legislators have amended statutes involving these presumptions to render them rebuttable under certain situations. However, the legislative response has not been complete and the presumptions remain conclusive in many cases.

Legislative action in California has resulted in a confusing and sometimes contradictory statutory scheme which bears no relationship to the policy interests originally determined to support a conclusive presumption of paternity. The determination of paternity is now governed by Evidence Code section 621 and California's version of the Uniform Parentage Act codified in Civil Code sections 7000 - 7021. The Uniform Parentage Act, adopted by California in 1975, governs paternity proceedings defining the parent child relationship, specifying who may bring an action to determine the existence or nonexistence of such a relationship, and establishing rebuttable presumptions affecting the burden of proof. At the time the Act was adopted, Evidence Code section 621 was expressly retained despite the fact that its provisions conflicted with aspects of the uniform act.

Under Civil Code section 7001, the parent child relationship is defined as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." Civil Code section 7002 provides that: "The parent and child relationship

extends equally to every child and to every parent, regardless of the marital status of the parents." Evidence Code section 621 conflicts with these provisions in that it recognizes the mother's husband as the child's "father" and prevents the natural father from establishing a legal parent child relationship.

Evidence Code section 621 is also contrary to the provisions found in Civil Code section 7004. Civil Code section 7004 establishes presumptions of paternity based upon a man's relationship to the child. Subsection (a)(1) of the section repeats the presumption based upon marriage; however, the presumption is of equal weight with other presumptions based upon psychological relationships. All presumptions within the section may be rebutted by clear and convincing evidence, and conflicting presumptions are resolved in favor of the presumption "which on the facts is founded on the weightier considerations of public policy and logic."

The rational basis of these provisions stands in stark contrast to the seemingly irrational limitations imposed by section 621. Evidence Code section 621 operates to conclusively determine a child's paternity based solely on the marital status of the mother without regard to biological truth or the best interests of the parties involved. The rebuttable presumptions of the Uniform Parentage Act permit a legal determination of paternity which takes these factors into account. The presumption of paternity contained in section 621 needlessly imposes restriction on the establishment of a legal parent child relationship between a biological parent and child. The legal consequences of this limitation are serious and affect several related areas of the law.

In California legal recognition of the parent child relationship is significant to decisions affecting all aspects of the child's daily life such as custody and visitation. California Civil Code section 4600 sets forth an order of preference to be followed by courts in making custody awards "according to the best interests of the child." *See* California Civil Code section 4608. Under the statute joint

custody to both parents is preferred, followed by sole custody to either parent. A nonparent will be awarded custody only if both parents consent, or the court determines that an award of custody to a parent would be detrimental to the child.

Similar preference is accorded to a parent in terms of orders for visitation. Under California Civil Code section 4601, a noncustodial parent is entitled to reasonable visitation rights unless it is shown that visitation will be detrimental to the best interests of the child. In contrast to this near absolute right, the statute provides that reasonable visitation rights *may* be granted to any other person having an interest in the welfare of the child in the court's discretion.

Legal recognition of the parent child relationship is also important in several other areas including: adoption [a parent is entitled to procedural protections under California Civil Code section 221 *et. seq.*]; guardianship of a minor [parents may nominate a guardian of the person or estate, or both, of a minor child under California Probate Code section 1500]; control of the services and earnings of a child [given to the child's parents by California Civil Code section 197]; determination of the child's name [a parent's interest in the child's surname has been recognized and protected, *see In re Marriage of Schiffman* (1980) 28 Cal.3d 640, 641, 169 Cal.Rptr. 918, 620 P.2d 579]; and obligations concerning financial support [parents and children have reciprocal duties of support under California Civil Code section 242].

The state of California confers rights and imposes obligations upon parents and children based upon their legal status as parents or children. A legal determination of paternity is, therefore, central to the resolution of any legal dispute involving the relationship. Evidence Code section 621 operates to bar recognition of this status.

The danger that any restriction on the ability to establish a legal status affecting such important rights will violate due process and

equal protection requirements is ever present and any statute having this effect should represent a balance between the interests of the state and those of the individual. Unless absolutely necessary to further a legitimate state interest, a statute should not operate to deny a natural parent and child the legal rights flowing from their relationship.

California Evidence Code section 621 is not tailored to further legitimate state interests. In fact the exceptions to the presumption themselves serve to defeat the policy considerations the statute was assertedly designed to protect. In the present case section 621 operates to deprive appellants of legal recognition of their biological and actual parent child relationship. The absence of any discernible interest in doing so adds substantially to the due process and equal protection claims.

## CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

DATED: October 20, 1985

Respectfully Submitted,

BRUCE M. BEALS

*Counsel for Appellants*

# APPENDIX

## OPINION

**REYNOSO, J.**—No human bond is cemented with greater strength than that of parent and child. We address the claims of two who assert they are the father of a daughter. One was the mother's husband; he raised, loved and nurtured the child until temporarily prevented from doing so after a divorce. The second claimant contends he is the natural father, has since

**[39 Cal.3d 358]**

married the mother and now lives with her and the child. By this triangular litigation each claimant seeks to be declared the legal father; the child, too, seeks a determination.

Evidence Code sectin 621 declares the presumption that ". . . the issue of a wife cohabiting with her husband . . . is presumed to be a child of the marriage."[1] In conformity with the statute, the trial court entered summary judgment in favor of the defendant below, Ronald W. Plaintiffs Donald R. and Michelle W., a minor, appeal challenging the constitutionality of the statute as applied to them. As will appear below, we hold that as applied to plaintiffs the statutory presumption violates neither the due process nor equal protection clauses of the California or United States Constitutions.

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[1]All further statutory references are to the Evidence Code, Section 621, subdivision (a) states in full that: "(a) Except as provided in subdivision (b), the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."

Subdivision (b) allows rebuttal of the presumption of subdivison (a) by blood test evidence. Subdivisions (c) and (d) provide that such evidence must be presented within two years of the child's birth.

Plaintiffs do not challenge and we do not now address any question regarding the adequacy of the two-year statute of limitations, although we note that the United States Supreme Court decision in *Mills v. Habluetzel* (1982) 456 U.S. 91 [71 L.Ed.2d 770, 102 S.Ct. 1549] suggests that this raises due process concerns.

We note that the version of section 621 which was in effect in 1981, the date plaintiffs filed their action, differs somewhat from that now in effect. Because plaintiffs challenge—and the appellate court analyzed—the present version of section 621, our decision, too, is based on the present statute.

I

Defendants Ronald and Judith W. were married on May 7, 1965, and lived together as husband and wife until their separation approximately 12 years later. Judith gave birth to two daughters, Tamara and Michelle, who were raised as the children of that marriage. During the marriage to Judith, Ronald W. provided the necessary support for the children. As the father of Tamara and Michelle, he tended, nurtured and loved them and received affection from them. Through their daily interchanges with Ronald and Judith, Tamara and Michelle were provided with the security, as well as the restraints, they needed for their growth and development.

Donald R., the second claimant to the paternity of Michelle, met Judith in 1973. Donald R. and Judith began having sexual relations in that year, although Judith and Ronald W. were married and living together. On October 24, 1974, Judith gave birth to Michelle. Donald R. did not claim paternity at the time of birth nor thereafter for four years while Judith and Ronald W. remained married and continued to live together. Donald R.

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asserted no claim nor accepted any responsibility. Throughout that time, without objection from Donald R., the obligation of parenting was fulfilled by Ronald W.

When Ronald and Judith W. separated they executed a marriage settlement agreement; Ronald was granted custody of Tamara, Michelle's sister, and Judith custody of Michelle, by then nearly five years of age. The issue of paternity was not raised. Ronald's obligation to provide child support for Michelle was also not at issue; it was agreed upon.

Following the dissolution of their marriage, Ronald W. regularly and continually exercised his visitation rights with Michelle. In November 1980, when Donald R. married Judith, Ronald W. was refused further visitation. That right was restored when he threatened court action to enforce the settlement agreement. Since

Judith's marriage to Donald R., Michelle has lived in Donald R.'s home and he has held her out to be his natural child.

In March 1981, this action to establish paternity was brought by Donald R. and Michelle, age six, through her guardian ad litem. Upon the uncontradicted facts that Ronald W. and Judith were living together as a married couple for nine years before Michelle's birth and that Ronald W. was neither impotent nor sterile, the trial court applied the presumption of section 621 and established that Ronald W. is the father of Michelle. Plaintiffs appeal.

II

The presumption of paternity established by section 621 is limited. The following prerequisites must be satisfied: first, the child's mother must be married; second, the mother must be cohabiting with her husband; third, the husband must be neither impotent nor sterile; fourth, two years must have passed since the birth of the child and during those two years the husband—or the mother in conjunction with the putative father—must have failed to rebut the presumption in court.

Plaintiffs assert alternative grounds for holding section 621 unconstitutional. First, section 621 prevents them from establishing the biological parent-child relationship in a court of law, thus depriving them of a liberty interest protected by the due process clause. Second, the gender-based classification of the statute which accords the natural father fewer procedural protections than the married natural mother violates the equal protection

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guarantee of the California and United States Constitutions.[2] In addition, they argue that the classifications in the statute deny

[2]The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." A similar provision is contained in the California Constitution, article I, section 7, subdivision (a) which states that "[a] person may not be deprived of life, liberty, or

them a fundamental right and thus the law should be strictly scrutinized.

A. *Due Process Claims*

We review two interests, that of the child and that of the alleged natural father. As to plaintiff Donald R., we hold that the statute is constitutional as applied. No due process violation can be found in applying the presumption to the facts of this case. Our conclusion is based upon a weighing of the competing private and public interests. We find that the public interest in protecting the family unit and promoting familial stability outweighs Donald R.'s interest.

*1. The Putative Father's Claim*

**(1a)** Does the application of the presumption of section 621 violate Donald R.'s due process rights? **(2)** We have held that the issue of whether section 621 adequately protects a putative father's interests "must be resolved by weighing the competing private and state interests." (*In re Lisa R.* (1975) 13 Cal.3d 636, 648 [119 Cal.Rptr. 475, 532 P.2d 123, 90 A.L.R.3d 1017], cert. den. (1975) 421 U.S. 1014 [44 L.Ed.2d 682, 95 S.Ct. 2421], rehg. den. (1975) 423 U.S. 885 [46 L.Ed.2d 116, 96 S.Ct. 159].) *In Board of Regents v. Roth* (1972) 408 U.S. 564, 570 [33 L.Ed.2d 548, 570, 92 S.Ct. 2701], the high court explained that "a weighing process has long been a part of any determination of the *form* of hearing required in particular situations. . . ." (Italics in original.)

The United States Supreme Court has scrutinized, under the due process clause, state laws limiting a natural father's relationship with his illegitimate offspring in three seminal cases,[3] *Stanley v.*

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property without due process of law or denied equal protection of the laws. . . ."

Although we deny plaintiffs' claims under both Constitutions, we do not hold that the provisions are identical in scope and purpose in all cases.

[3]The issue was also raised in *Caban v. Mohammed* (1979) 441 U.S. 380 [60 L.Ed.2d 297, 99 S.Ct. 1760]. Because that case was decided on equal protection grounds, the court expressed no view on the due process challenge. (*Id.*, at p. 394, fn. 16 [60 L.Ed.2d at p. 308].)

*Illinois* (1971) 405 U.S. 645 [31 L.Ed.2d 551, 92 S.Ct. 1208], *Quilloin v. Walcott* (1978) 434 U.S. 246 [54 L.Ed.2d 511, 98 S.Ct. 549], reh. den. (1978) 435 U.S. 918 [55 L.Ed.2d

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511, 98 S.Ct. 1477], and most recently in *Lehr v. Robertson* (1983) 463 U.S. 248 [77 L.Ed.2d 614, 103 S.Ct. 2985].

In *Stanley*, an unwed father lost custody of his three children upon the death of the children's unwed mother. The father, Stanley, had lived with the children and their mother since their birth and they were summarily taken and placed with court appointed guardians without any prior hearing. This deprivation was found to violate the due process clause of the Fourteenth Amendment. Justice Powell, writing for the court, concluded that Illinois, "insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." (405 U.S., at p. 658 [31 L.Ed.2d at p. 562].) Thus, Illinois could not automatically destroy the Stanley family and uproot the children without first providing the father with the opportunity to be heard on the issue of parental fitness.

The limits on a putative father's due process rights were addressed in *Quilloin v. Walcott, supra*, 434 U.S. 246, where the Supreme Court held that a Georgia statute which denied an unwed father the right to veto an adoption of his illegitimate child did not violate the due process clause. The father in that case only sought to claim paternity after the mother and her new husband had initiated adoption proceedings. The court held that the denial of the father's legitimation petition—found by the trial court to be in the child's best interest—did not violate the due process clause.

Finally, the court most recently addressed this issue in *Lehr v. Robertson, supra*, 463 U.S. 248. Lehr, the putative father, sought to invalidate an adoption order granted in favor of the biological mother and her husband. The child was already two years old at the time and the father "never had any significant custodial,

personal, or financial relationship with [the child], and he did not seek to establish a legal tie until she was two years old." (*Id.*, at p. 262 [77 L.Ed.2d at p. 627], fn. omitted.)

This court has examined the conclusive presumption of paternity in *Lisa R., supra*, 13 Cal.3d 636, where a putative father sought to continue the parent-child relationship he had established with his daughter. In *Lisa R.*, although the minor child was presumed to be legitimate, both of her parents were deceased and the child was being adjudicated a dependent of the juvenile court. With adoption proceedings by foster parents pending, Lisa's putative father sought to prove his paternity and obtain visitation rights. Following the United States Supreme Court's decision in *Stanley v. Illinois,*

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*supra*, 405 U.S. 645, we held that the Evidence Code's preclusion of proof of paternity offended the constitutional guarantee of due process of law.

**(1b)** The difference between the state threatened dissolution and termination of a developed parent-child relationship in *Stanley* and *Lisa R.* and the denial of a legal determination of paternity in the case at bench is clear and significant. As we recently noted, "In both *Stanley* and *Lisa R.*, the putative fathers were seeking to establish their legal relationship with children who otherwise had no parents and were wards of the state." (*Estate of Cornelious* (1984) 35 Cal.3d 461, 466 [198 Cal.Rptr. 543, 674 P.2d 245], app. dism. (1984) — U.S. — [80 L.Ed.2d 812, 104 S.Ct. 2337].)

This is not a case where the state has attempted to intervene or to prevent the establishment of a relationship between putative father and child.[4] Rather, Donald R. seeks a determination that he is Michelle's "legal" father, notwithstanding the established and continuing emotional and financial father-daughter relationship

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[4]We leave open the question of the validity of section 621 as applied to such situations or to termination situations for a case in which the issue is squarely presented.

between Michelle and Ronald.[5] Accordingly, we conclude that Donald's abstract interest in establishing paternity is not as weighty as the interests of the fathers in *Stanley* and *Lisa R.*

We turn to the interests of the state. Numerous policy considerations have been cited in favor of a conclusive presumption of paternity, including certain social policies upholding the integrity of the family (*Kusior v. Silver* (1960) 54 Cal.2d 603, 619 [7 Cal.Rptr. 129, 354 P.2d 657]), and protecting the child's welfare (*In re Lisa R., supra*, 13 Cal.3d at pp. 649-650).

Thus, section 621 does not purport to factually determine the biological paternity of a child. (*Kusior v. Silver, supra*, 54 Cal.2d at p. 619.) We note that, as stated by the United States Supreme Court, "[t]he actions of judges neither create nor sever genetic bonds." (*Lehr v. Robertson, supra*, 463

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U.S. at p. 261 [77 L.Ed.2d at p. 626].) The interests noted above apply to the facts of the case at bench. Here, Donald R.'s private interest in establishing a biological relationship in a court of law is overridden by the substantial state interests in familial stability and the welfare of the child. Accordingly, the application of section 621 to the instant case comported with the requirement of due

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[5]Ronald W. argues, without citation to authority, that in enacting section 621 the Legislature sought to prevent children from being stigmatized as "illegitimate." Even assuming that this argument is correct, this state's subsequent adoption of the "Uniform Parentage Act" (Civ. Code, § 7000 et seq., added by Stats. 1975, ch. 1244, § 11, pp. 3196-3204) has rendered such a consideration to be without any legal effect. The act, approved in 1973 by the National Conference of Commissioners on Uniform State Laws (see Uniform Parentage Act, Comrs. Prefatory Note, 9A U.L.A. (Master ed. 1979) pp. 579-582), "makes a revolutionary change in the law by abolishing the incidents of illegitimacy and establishing legal equality of children without regard to the marital status of their parents" (6 Witkin, Summary of Cal. Law (8th ed., 1984 supp.) Parent and Child, § 242A, p. 326). As now provided by Civil Code section 7002, "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." Accordingly, we reject Ronald's argument that the "stigma" of illegitimacy should be considered in determining the constitutionality of section 621.

process of law.

*2. The Child's Claim*

**(3a)** The second interest to consider in this case, the interest of Michelle in a legal determination of who her biological father is, has been treated by the other litigants as an appendage to the rights of the putative father. The guardian ad litem for Michelle is a family friend of Donald and Judith R. Michelle is represented by the same attorney as Donald R. and their interests have been continually asserted as being consistent with each other. Our concern is that Michelle is not the real actor behind this "child" paternity suit and that she may be asserting a right which may or may not be in her best interests.[6] We are not convinced under the circumstances of this case, that Michelle's rights are greater than those afforded to Donald R.

In *Estate of Cornelious, supra*, 35 Cal.3d 461 we held that the guarantee of due process of law was not offended when a child was precluded from proving paternity by the operation of section 621. In *Estate of Cornelious*, as in the case at bench, we apply a balancing test to resolve an as applied challenge to the statute in question. (35 Cal.3d at p. 467.) Because Michelle's rights have not been argued to be separate from Donald R.'s we cannot conclude that her interest in establishing paternity outweighs the state's interest in preserving and protecting the developed parent-child and sibling relationships which give young children social and emotional strength and stability. Given the facts that Michelle has a legal father and that he opposes this attempt to have Donald R. declared the biological father, we are unpersuaded that a judicial

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[6]The possibility exists for a conflict between a child's interest and that of the putative father. For example, it has been noted that "[u]nlike adults, children have no psychological conception of relationship by blood-tie until quite late in their development. For the biological parents, the facts of having engendered, borne, or given birth to a child produce an understandable sense of preparedness for proprietorship and possessiveness. These considerations carry no weight with children who are emotionally unaware of events leading to their births." (Goldstein et al., Beyond the Best Interests of the Child (1979) at p. 12.)

juggling of Michelle's family relationships is warranted by her abstract interest in establishing paternity.

**(4)** We reject plaintiffs' suggestion that section 621 as applied to Michelle is constitutionally defective pursuant to the authority of *Vlandis v. Klein* (1973) 412 U.S. 441 [37 L.Ed.2d 63, 93 S.Ct. 2230]. In *Vlandis* the United

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States Supreme Court invalidated a permanent and irrebuttable presumption that students who were nonresidents when they applied to attend state universities remained nonresidents for purposes of assessing fees and tuition.[7] While *Vlandis* involved a purported factual determination of residency, section 621 does not purport to determine biological paternity. Rather, it is "in actuality a substantive rule of law" designed to further public policies. (*Kusior v. Silver, supra*, 54 Cal.2d 603, 619.)

Furthermore, because we apply the balancing test utilized in *Estate of Cornelious*, we cannot conclude that the presumption of section 621 is necessarily irrebuttable. Simply because Donald R. and Michelle are unable to rebut the presumption does not mean that we interpret section 621 to be a "conclusive and unchangeable presumption." (*Vlandis v. Klein, supra*, 412 U.S. at p. 443 [37 L.Ed.2d at p. 66].) Rather, we merely conclude that the denial of Michelle's motion for blood tests was justified because the state interests outweighed her abstract interest in vindicating true parentage.

**(3b)** Michelle is not being threatened with termination of her association with Donald R. She is not even being prevented from obtaining information as to who her biological father is. As stated

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[7]We also reject plaintiffs' argument tht *Vlandis* requires invalidation of a conclusive presumption whenever there is a "reasonable alternative means" of proving the presumed fact. In *Vlandis* the existence of other methods of proving residency was one factor in the Supreme Court's analysis. In invalidating the statutory presumption, the court discussed the state's purposes for the presumption and determined that those were not served by applying the presumption to the case before it. (412 U.S. 441, at pp. 448-452 [37 L.Ed.2d 63, 69-71, 93 S.Ct. 2230].)

by the United States Supreme Court, the extent to which due process must be afforded an individual "is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" (*Goldberg v. Kelly* (1970) 397 U.S. 254, 262-263 [25 L.Ed.2d 287, 296, 90 S.Ct. 1011].) We cannot say that denying Michelle the opportunity to present blood test evidence in a court of law violates the guarantee of due process of law.

B. *Equal Protection*

**(5)** The guarantee of equal protection ensures that "no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in like circumstances . . . ." (*People v. Romo* (1975) 14 Cal.3d 189, 196 [121 Cal.Rptr. 111, 534 P.2d 1015].) Specifically, a sovereign may not subject men and women to disparate treatment where there is no substantial relationship between the classification and an important governmental purpose. (*Reed v. Reed* (1971) 404 U.S. 71, 76 [30 L.Ed.2d 225, 229, 92 S.Ct. 251]; *Craig v. Boren* (1976) 429 U.S. 190,

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197 [50 L.Ed.2d 397, 407, 97 S.Ct. 451], reh. den. (1977) 429 U.S. 1124 [51 L.Ed.2d 574, 97 S.Ct. 1161].)

**(6)** Section 621 allows the natural mother of the presumed child to bring a suit to rebut the presumption that her husband is the child's father. Plaintiffs claim that this constitutes an impermissible gender-based distinction because the putative father is not allowed to rebut the presumption.[8] We disagree.

Subdivision (d) of section 621 states: "The notice of motion for blood tests under subdivision (b) may be raised by the mother of

[8]Michelle's guardian and Donald R. also argue that putative fathers are denied a fundamental right to establish a parent-child relationship. As discussed in our due process analysis of this case, we fail to find such a deprivation. The association between Donald R. and Michelle is already enjoyed and the state does not seek its disruption or its termination.

the child not later than two years from the date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child." We note that the plain word of the statute indicates that the rights of the natural married mother and the natural unwed father are conditioned upon each other.

Thus, this case is distinguishable from *Caban v. Mohammed, supra*, 441 U.S. 380. In that case the Supreme Court invalidated a statutory scheme under which only unwed mothers—and not unwed fathers—received hearings prior to a termination of child custody.

In *Caban*, one parent had an absolute unconditional right and the other parent had absolutely none. In our due process analysis, we have declined to interpret section 621 as an absolute bar to all suits to establish paternity by either the putative father or the presumed legitimate child. Rather, we have applied the balancing test analysis of *Lisa R.* and *Estate of Cornelious*. In contrast to *Caban*, although Donald R. and Michelle are not able to rebut the presumption under the facts of this case, this does not mean that all putative fathers and all presumed legitimate children are barred in all cases. Thus, we fail to find that the statutory scheme, as interpreted by the courts and as applied to plaintiffs' case, violates the guarantee of equal protection of the laws.

The judgment is affirmed.

Mosk, J., Kaus, J., Broussard, J., and Grodin, J., concurred.

**BIRD, C.J.**—I respectfully dissent. The application of the conclusive presumption of paternity (Evid. Code, § 621) to deny plaintiff, Donald R., the

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opportunity to prove that he is Michelle's biological father denies him due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).)

In upholding the presumption here, the majority purport to weigh the competing private and public interests as required by *In re Lisa R.* (1975) 13 Cal.3d 636, 648-651 [119 Cal.Rptr. 475, 532 P.2d 123, 90 A.L.R.3d 1017] and *Estate of Cornelious* (1984) 35 Cal.3d 461, 467 [198 Cal.Rptr. 543, 674 P.2d 245]. However, the majority's weighing of interests proceeds according to a most curious logic.

At the outset, the majority tip the scales in favor of Ronald W. when they label him "the father" (maj. opn., *ante*, at p. 358) and the "legal father" (*id.*, at p. 363) of Michelle. Those labels beg the question to be decided, since plaintiffs seek a declaration that Donald R. is the legal father. Similarly, the majority suggest that Ronald W.'s relationship with Michelle will be jeopardized unless the presumption is upheld. Yet, they fail to explain how that relationship is threatened by plaintiffs' attempt to rebut the presumption.

On the other end of the scale is plaintiffs' interest in establishing that Donald R. is the father. The majority focus narrowly on the apparent security of Donald R.'s current relationship with Michelle and disregard the legal vulnerability of that bond. (See Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family has Failed* (1984) 70 Va. L.Rev. 879, 912-919 [hereafter *Rethinking Parenthood*].) Having thus limited the scope of inquiry, they conclude without difficulty that plaintiffs have only an "abstract interest in establishing paternity." (Maj. opn., *ante*, at p. 362.) According to the majority, this "abstract" interest is outweighed by the public interest in protecting the stability of a family unit which ceased to exist years ago. (See *id.*, at p. 360.) This is a strange sort of weighing indeed.

The state's interest in preserving the integrity of the family unit (*In re Lisa R., supra*, 13 Cal.3d at p. 650; *Kusior v. Silver* (1960) 54 Cal.2d 603, 619 [7 Cal.Rptr. 129, 354 P.2d 657]) is not even implicated here. The family unit formerly composed of Ronald W., Judith W., Michelle, and her sister no longer exists. It was destroyed when Ronald W. and Judith W. divorced. The majority's assertion that this nonexistent family unit is threatened

by plaintiffs' action to establish paternity is baffling.

Equally baffling is their assumption that Ronald W.'s relationship with Michelle is threatened. Ronald W. currently enjoys rights to regular visitation with Michelle. These rights, which arose from the years in which he

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accepted daily parental responsibility for her, would continue to protect his interest in visitation even if Donald R. were declared the legal father. (See *post*, at pp. 367-371.) Accordingly, it is not necessary to uphold the conclusive presumption in order to protect Ronald W.'s interest.

Prior to the institution of the proceedings leading to this appeal, Ronald W. was obligated to provide for Michelle's support by statute (Civ. Code, §§ 196, 196a)[1] and by a provision in his marriage settlement agreement with Judith W. Similarly, he was entitled to reasonable visitation with Michelle both by statute (§ 4601)[2] and by the terms of the agreement. The majority are unable to explain how these obligations and rights would be altered, much less destroyed, by a decision permitting Donald R. to offer scientific proof that he is Michelle's biological father.

Let's assume for the moment that a judgment declaring Donald R. to be Michelle's biological father would terminate Ronald W.'s status as a "father" under sections 196 and 196a. Nothing in this record or in the authorities cited by the parties suggests that Ronald W.'s support obligation and visitation rights under the marriage settlement agreement would disappear. (Compare § 229 [*adoption* decree automatically terminates the parents' duties towards, and rights over, a child who is adopted].)

The argument may be taken a step further. Assume that all of Ronald W.'s rights and obligations, both as a "father" under

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[1]Unless otherwise noted, all statutory references are to the Civil Code.

[2]Section 4601 provides: "Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child."

section 196 and 196a and as a party to the marriage settlement agreement, would be extinguished upon a judicial declaration that Donald R. is Michelle's biological father. Ronald W. would then be left with the legal status of a former stepparent. However, even under these circumstances, his relationship with Michelle would not be jeopardized.

The rights of stepparents were persuasively asserted by the Utah Supreme Court in *Gribble v. Gribble* (Utah 1978) 583 P.2d 64 [1 A.L.R.4th 1263]. In that case, a wife filed a divorce action. The husband counterclaimed for visitation rights with the wife's son by a previous marriage. The husband had not adopted the son. However, he claimed that he had lived with the boy for four years, that he had treated him as his own son, and that he was concerned about the boy's future. The trial court held as a matter of law that a stepparent was not entitled to a hearing on the issue of visitation. (*Id.*, at p. 65.)

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The Utah Supreme Court reversed and remanded, holding the stepfather entitled under the due process clause of the state constitution to a hearing to determine whether he stood *in loco parentis* to the boy. The court held that a stepparent who has assumed the status and obligations of a parent without formal adoption is entitled to the same visitation rights as a natural parent. (*Gribble, supra*, 583 P.2d at pp. 67, 68.) It also noted that divorce does not terminate the stepparent's *in loco parentis* status. Only the stepchild or the stepparent may terminate that relationship. (*Id.*, at p. 67.)

*Gribble*'s application of the *in loco parentis* doctrine to stepparent visitation rights is cited with approval in *Perry v. Superior Court* (1980) 108 Cal.App.3d 480, 486 [166 Cal.Rptr. 583] (conc. opn. of Hopper, J.). In this marital dissolution action, the superior court entered an order granting a husband visitation privileges with the wife's minor child by a former marriage.

The Court of Appeal granted the wife's petition for a writ of prohibition, holding that in a divorce proceeding a superior court

lacks jurisdiction to award visitation privileges to a spouse who is not the natural or adoptive parent of the other spouse's child. (*Perry, supra*, 108 Cal.App.3d at pp. 484-485.)[3] Dissatisfied with the result it was compelled to reach, the court invited the Legislature to address the "thorny problem of visitation by stepparents." (108 Cal.App.3d at p. 485.)

In his concurring opinion, Justice Hopper noted that the husband had not alleged that he stood *in loco parentis* to the child. "[I]f [the] husband had raised the issue and had been found by the superior court to be *in loco parentis* with regard to Lonnie, one could conclude that Lonnie was a 'child of the marriage' within Civil Code section 4351 [citations]." (*Perry, supra*, 108 Cal.App.3d at p. 486 (conc. opn. of Hopper, J.); see also *In re Marriage of Halpern* (1982) 133 Cal.App.3d 297, 307 [184 Cal.Rptr. 740].)

The 1982 Legislature, in an apparent response to the *Perry* court's invitation, added section 4351.5 to the Civil Code. Subdivision (a) of section 4351.5 gives the superior court in a marriage annulment or dissolution proceeding jurisdiction to award reasonable visitation rights to a stepparent.[4]

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The statute provides for mandatory mediation (subd. (c)) and a court hearing if mediation fails to produce a settlement (subd. (h)). Both the stepparent seeking visitation rights and any natural or adoptive parent must be given notice of the mediation (subd. (i)),

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[3]In marital dissolution actions, the jurisdiction of the superior court over child custody and visitation matters is restricted to the "'minor children of the marriage.'" (*Perry, supra*, 108 Cal.App.3d at p. 484, quoting § 4351; see also § 5151, subd. (2).)

[4]Subdivision (a) of section 4351.5 provides: "Notwithstanding the provisions of Section 4351, in proceedings under Sections 4450 [annulment] and 4503 [dissolution or legal separation], the superior court has jurisdiction to award reasonable visitation rights to a person who is a party to the marriage that is the subject of the proceeding with respect to a minor child of the other party to the marriage, if visitation by that person is determined to be in the best interests of the minor child."

notice of any subsequent hearing, and an opportunity to appear and be heard at such hearing (subd. (h)). Visitation rights may be awarded to the stepparent if the court determines that such visitation is in the best interests of the child. (Subd. (a); see generally Witkin, Summary of Cal. Law (8th ed., 1984 supp. to vol. 6) Parent and Child, § 83A, pp. 217-218.)

The enactment of section 4351.5 did not supplant the alternative method by which a superior court may award stepparent visitation under the *in loco parentis* doctrine. (*Perry v. Superior Court, supra*, 108 Cal.App.3d at p. 486 (Conc. opn. of Hopper, J.).) The courts of this state have repeatedly held that one standing *in loco parentis* to a child has the same rights and duties as a natural parent.

"'It is the well-settled law that one standing *in loco parentis* to those held out as members of his family is entitled to all the rights of a parent. He also incurs the same liability with respect to them that he is under to his own children. The relation being established, the reciprocal rights, duties, and obligations pertaining to it arise between them the same as if he [were] their natural father.'" (*Trudell v. Leatherby* (1931) 212 Cal. 678, 682 [300 P. 7], overruled on another point in *Gibson v. Gibson* (1971) 3 Cal.3d 914, 923 [92 Cal.Rptr. 288, 479 P.2d 648]; see *Loomis v. State of California* (1964) 228 Cal.App.2d 820, 823 [39 Cal.Rptr. 820]; cf. *Adoption of McDonald* (1954) 43 Cal.2d 447, 458-460 [274 P.2d 860] [agency to which child is relinquished for adoption does not acquire the right of a natural parent to withhold consent to adoption; like that of a guardian, an adoption agency's relationship to a child lacks the "natural affection between parent and child" which is the basis of a natural parent's rights].)

More recently, this court stated that "[t]he fact of biological parenthood may incline an adult to feel a strong concern for the welfare of his child, but it is not an essential condition; a person who assumes the role of parent, raising the child in his own home, may in time acquire an interest in the 'companionship, care, custody and management' of that child. The interest of the 'de facto parent' is a substantial one, recognized by the decision of this court in *Guardianship of Shannon* (1933) 218 Cal. 490 [23 P.2d

1020] and by courts of other jurisdictions and deserving of legal protection." (*In re B. G.* (1974) 11 Cal.3d 679, 692-693 [114 Cal.Rptr. 444, 523 P.2d 244],

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fns. omitted; see Goldstein et al., Beyond the Best Interests of the Child (1973) pp. 17-20.)[5]

In summary, the interests of both Ronald W. and Donald R. vis-a-vis Michelle are subject to certain procedural and substantive protections no matter which of them is legally recognized as Michelle's father. Those protections are based on common law, constitutional, and statutory principles.

Both men have developed a parent-child relationship with Michelle. At different times, each man has willingly assumed full parental responsibilities for her. Each man appears to be entitled to the application of the procedural protections and substantive standards available to a "de facto parent" (*In re B. G., supra*, 11 Cal.3d at pp. 692-693) or one standing *in loco parentis* to a child (*Trudell v. Leatherby, supra*, 212 Cal. at p. 682; *Perry v. Superior Court, supra*, 108 Cal.App.3d at p. 486 (conc. opn. of Hopper, J.).)

The protections afforded by the common law are consistent with constitutional due process concerns which arise whenever an established parent-child bond is threatened. Such concerns are implicated whether the "parent" is a stepfather (see *Gribble v.*

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[5]The term "de facto parent" was used in *In re B. G.* "to refer to that person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care." (11 Cal.3d at p. 692, fn. 18.) The relationship of the term to the *in loco parentis* doctrine was not discussed. At least one court has used the two concepts interchangeably. (See *In re Marriage of Halpern, supra*, 133 Cal.App.3d at p. 310, fn. 3.)

In *In re B. G.*, the foster parents of minors who had been adjudged dependent children of the juvenile court were granted standing to appear as parties in juvenile court proceedings. (11 Cal.3d at p. 693.) The question "[w]hether constitutional principles of due process or equal protection may require that a de facto parent, in some instances, receive rights of notice, hearing, or counsel afforded natural parents or guardians" was expressly left open. (*Id.*, at p. 693, fn. 21.)

*Gribble, supra*, 583 P.2d at pp. 67, 68), a man who claims to be the biological father (*In re Lisa R., supra*, 13 Cal.3d at p. 649; see *Stanley v. Illinois* (1972) 405 U.S. 645 [31 L.Ed.2d 551, 92 S.Ct. 1208]), or a foster parent (*In re B. G., supra*, 11 Cal.3d at p. 693).

In addition to these constitutional and common law rights, each man would have certain statutory rights in future proceedings affecting his relationship with Michelle. Donald R. would be entitled to notice and an opportunity to be heard on the issue of his right to reasonable visitation with Michelle in any proceeding to dissolve his marriage to Michelle's mother. (§ 4351.5; see *ante*, at pp. 368-369.) Ronald W., even if the presumption that he is Michelle's father had been successfully rebutted, could be granted reasonable visitation rights. (§ 4601.)

The majority assume that Donald R.'s interest in establishing his biological paternity of Michelle is outweighed by Ronald W.'s competing interest

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in protecting his developed parent-child relationship with her. The foregoing discussion exposes the fallacy of that assumption. In fact, Ronald W.'s relationship with Michelle is *not* in jeopardy. Their relationship has been reduced to one of regular visitation as the result of a marital dissolution. A judicial declaration that Donald R. is the legal and biological father of Michelle would not restrict or destroy that relationship.

On the other side of the scale, the majority obscure the nature of Donald R.'s interest by vaguely labeling his relationship with Michelle as an "association." (See maj. opn., *ante*, at p. 365, fn. 8.) However the bond between Donald R. and Michelle is labeled, it is clear that they currently enjoy a day-to-day parent-child relationship with all of the practical attributes of legal custody. Maintaining the continuity of that relationship is important to the child's psychological well-being. (See *Rethinking Parenthood, supra*, 70 Va. L.Rev. at pp. 902-911.) By denying plaintiffs the opportunity to establish that Donald R. is Michelle's legal father, the majority assure that their relationship stands on a shaky legal foundation.

For example, if Donald R. and Judith W. were to divorce, Judith W. would be entitled to sole custody of Michelle. (See § 4600, subd. (b)(1).)[6] If Judith W. died, Ronald W., not Donald R., would be entitled to sole custody as the legally recognized surviving "parent." (*Ibid.*) Donald R. would be entitled to custody only (1) if both Judith W. and Ronald W. had given their consent or died, or (2) if a court found that an award of custody to either of them would be detrimental to Michelle. (See § 4600, subds. (b)(2), (c); see generally, *Rethinking Parenthood, supra*, 70 Va. L.Rev. at pp. 912-919.)

Thus, Donald R.'s interest in establishing his paternity is far from abstract. If any of the asserted interests in this case is abstract, it is the state's interest in protecting the integrity of a nonexistent family.[7]

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[6]Section 4600 sets forth an order of preference to be followed by courts in making custody awards "according to the best interests of the child . . . ." (§ 4600, subd. (b); see § 4608.) Under the statutory scheme, joint custody is preferred, followed by custody with either parent. (Subd. (b)(1).)

If custody is not awarded to either parent, the next order of preference is for placement with a "person or persons in whose home the child has been living in a wholesome and stable environment." (Subd. (b)(2).) Custody may not be awarded to a nonparent without the consent of the parents unless the court finds that an award of custody to a parent would be detrimental to the child. (Subd. (c).)

A noncustodial parent is entitled to reasonable visitation rights unless it is shown that visitation will be detrimental to the best interests of the child. (§ 4601.)

[7]The majority properly reject Ronald W.'s argument that the conclusive presumption of paternity should be upheld to protect Michelle from being branded an illegitimate. (Maj. opn., *ante*, at fn. 5.) I would go further and expressly disapprove the cases which have cited avoidance of the stigma of illegitimacy as a policy consideration supporting a conclusive **[p. 372]** presumption. (*Estate of Cornelious, supra*, 35 Cal.3d at p. 465; *In re Madalina* (1917) 174 Cal. 693, 697 [164 P. 348, 1 A.L.R. 1629]; *Vincent B. v. Joan R.* (1981) 126 Cal.App.3d 619, 623 [179 Cal.Rptr. 9]; *In re Marriage of B.* (1981) 124 Cal.App.3d 524, 529-530 [177 Cal.Rptr. 429]; *People v. Thompson* (1979) 89 Cal.App.3d 193, 198 [152 Cal.Rptr. 478]; *County of San Diego v. Brown* (1978) 80 Cal.App.3d 297, 303 [145 Cal.Rptr. 483]; cf. *In re Lisa R., supra*, 13 Cal.3d at p. 650; *People v. Sorensen* (1968) 68 Cal.2d 280, 288-289 [66 Cal.Rptr. 7, 437 P.2d 495, 25 A.L.R.3d 1093]; *Estate of Lund* (1945) 26 Cal.2d 472, 480-482 [159 P.2d 643, 162 A.L.R. 606]; *Estate of McNamara* (1919) 181 Cal. 82, 95 [183 P. 552, 7 A.L.R. 313]; *Estate of Walker* (1917) 176 Cal. 402, 410 [168 P. 689]; *Cramer v. Morrison*

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Whenever the conclusive presumption of paternity is challenged on due process grounds, competing interests must be carefully balanced. In this case, the result of that balancing process compels but one conclusion—that Donald R. must be permitted an opportunity to rebut the presumption. The recognized state interests in upholding the presumption are either nonexistent or entitled to no deference under the circumstances of this case. The family unit for which the majority reserve such solicitude ceased to exist long ago.

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(1979) 88 Cal.App.3d 873, 885 [153 Cal.Rptr. 865].)

Disapproval of these decisions to the extent that they rely on avoidance of the stigma of illegitimacy is supported by constitutional considerations. In this regard, the recent decision of the United States Supreme Court in *Palmore v. Sidoti* (1984) — U.S. — [80 L.Ed.2d 421, 104 S.Ct. 1879] is instructive. In that case, the court unanimously reversed the order of a Florida trial court which had awarded custody of a child to the father on the ground that the mother was cohabiting with a black man. The mother and the child were white. The trial court's decision had turned solely on "what it regarded as the damaging impact on the child from remaining in a racially-mixed household." (*Id.*, at p. — [80 L.Ed.2d at p. 425, 104 S.Ct. at p. 1881].) The trial court had stated that "despite the strides that have been made in bettering relations between the races in this country," the child would inevitably "suffer from the social stigmatization that is sure to come." (*Ibid.*, italics omitted.)

In reversing, the high court held that the possibility of stigmatization due to racial biases and stereotypes was not a legitimate basis for the custody determination. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (*Palmore v. Sidoti, supra*, — U.S. at p. — [80 L.Ed.2d at p. 426, 104 S.Ct. at p. 1882].)

The court left no doubt that the constitutional imperative governed the actions of judicial officers. (*Palmore v. Sidoti, supra*, — U.S. at p. —, fn. 1 [80 L.Ed.2d at p. 425, 104 S.Ct. at p. 1881]; *Shelley v. Kraemer* (1948) 334 U.S. 1 [92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441]; *Ex Parte Virginia* (1880) 100 U.S. 339, 346-347 [25 L.Ed. 676, 679].) "'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.'" (*Palmore v. Sidoti, supra*, — U.S. at p. — [80 L.Ed.2d at p. 426, 104 S.Ct. at p. 1882], quoting *Palmer v. Thompson* (1971) 403 U.S. 217, 260-261 [29 L.Ed.2d 438, 464-465, 91 S.Ct. 1940] (dis. opn. of White, J.).) Private prejudice based on illegitimacy should be accorded no greater judicial deference.

Similarly, plaintiffs' action poses no danger to the private interests of the "presumed" father, Ronald W.

On the other side of the scale is the emotional and familial bond which has developed between Donald R. and Michelle in their current living situation. Plaintiffs have demonstrated a substantial interest in establishing the legal foundation necessary to protect that bond. The majority have advanced

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no reason that will justify barring plaintiffs from making the attempt. Accordingly, I would reverse.

## OPINION

**BROWN (Gerald), P. J.**—Donald R. and Michelle W., a minor, by and through her guardian ad litem, sued Ronald W., alleging Donald R. is Michelle's natural father and seeking a declaration of his paternity. Judith R., Michelle's mother, was joined as a nominal defendant. Summary judgment was granted in favor of defendants under Evidence Code section 621. The plaintiffs appeal.

Judith R. and Ronald W. were married in 1965 and lived together continuously for more than 13 years before separating in 1978. Judith gave birth to Michelle on October 25, 1974. Judith and Ronald W. were living together at the time of Michelle's birth and Ronald W. was neither impotent nor sterile. The marriage was dissolved by final judgment entered September 4, 1979.

Beginning in September 1973 and continuing through the final six years of Judith's marriage to Ronald W., Judith and Donald R. regularly engaged in sexual relations. By declaration, Judith said Michelle was conceived during her relations with Donald R. and he is Michelle's natural father. In 1980, Donald R. and Judith were married. Michelle lives with the Donald R.'s as provided for by the 1979 dissolution order granting Judith custody of Michelle. The order also grants Ronald W. visitation rights, which he has exercised regularly since the divorce.

Michelle's guardian ad litem and Donald R. seek declaratory relief establishing a father-child relationship between Donald R. and Michelle. Plaintiffs moved for an order requiring blood tests of the parties to prove paternity. The motion was never granted as the superior court granted defendants summary judgment under Evidence Code section 621. Section 621 states "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." The presumption may be rebutted by blood tests showing the husband is not the father of the child but only the husband or the mother may request the blood tests. The plaintiffs here are not allowed to present the blood test evidence and thus, as to them, the presumption is irrebuttable. Plaintiffs do not deny section 621 applies here

nor do they contest the presumption, if valid, justifies summary judgment. They claim,

**[139 Cal.App.3d 27]**

however, section 621, as applied here, violates the equal protection and due process clauses of the United States Constitution.[1]

Before discussing the merits of the due process and equal protection claims, we address Ronald W.'s statute of limitations defense. Under section 621, an action by the mother or presumed father of the child to rebut the presumption of legitimacy must be brought within the first two years of the child's life. As Michelle was over six years old when this action was brought, Ronald W. argues the presumption is conclusive as to all parties and thus the statute's failure to grant Michelle standing to rebut the presumption is irrelevant. This argument misses the point. If section 621 granted Michelle standing to rebut the presumption and imposed a two-year period of limitations on such an action, the statute might not violate the Constitution. However, the statute does not allow Michelle to present rebuttal evidence *at any time*. The same constitutional issues would be present if this case had been brought within the first two years of Michelle's life. We may not rewrite section 621 to grant Michelle standing but impose the statute of limitations (*Marsh v. Supervisors* (1896) 111 Cal. 368, 372-373 [43 P. 975]); the statute must stand or fall as written. The inability of parties other than the plaintiffs to bring this action due to the statute of limitations is irrelevant.

**(1a)** Michelle's due process argument is based on *Vlandis v. Kline* (1973) 412 U.S. 441 [37 L.Ed.2d 63, 93 S.Ct. 2230], which holds irrebuttable presumptions violate the due process clauses of the Fifth and Fourteenth Amendments where there are more

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[1]Our constitutional review of section 621 focuses on its validity in the context of a paternity claim by the child. It should be noted, however, section 621 also denies the putative father standing to challenge the presumption of legitimacy and this also raises serious constitutional questions. (See *R. McG v. J. W.* (1980) 44 Colo.App. 446 [615 P.2d 666].) We do not address those questions only because our analysis of Michelle's rights disposes of the case.

reliable methods for determining the truth of the presumed fact than simply presuming it to be true. Such is the case here. Ronald W. is conclusively presumed to be Michelle's father and yet the truth of his paternity could be more accurately determined by the introduction of blood test evidence. (See Evid. Code, § 895; *Cramer v. Morrison* (1979) 88 Cal.App.3d 873 [153 Cal.Rptr. 865].) However, the availability of evidence to show the presumed fact does not necessarily follow from the proven fact is not enough to establish the presumption violates due process because the presumption is more than a procedural device. **(2)** The presumption of legitimacy is a substantive rule of law enacted to further public policy rather than to insure an accurate determination of paternity (*Kusior v. Silver* (1960) 54 Cal.2d 603, 619 [7 Cal.Rptr. 129, 354 P.2d 657]; *In re Marriage of B.* (1981) 124 Cal.App.3d 524, 528 [177 Cal.Rptr. 429]). Therefore, we must examine the policies

**[139 Cal.App.3d 28]**

behind section 621 to determine if those policies are furthered by application of the presumption here (*In re Lisa R.* (1975) 13 Cal.3d 636, 650 [119 Cal.Rptr. 475, 532 P.2d 123, 90 A.L.R.3d 1017], cert. den. 421 U.S. 1014 [44 L.Ed.2d 682, 955 S.Ct. 2421], rehg. den. 423 U.S. 885 [46 L.Ed.2d 116, 96 S.Ct. 159]).

The purposes underlying the presumption of legitimacy are protection of the integrity of the family unit, protection of the child from the stigma of illegitimacy and provision of private support for the child (*County of San Diego v. Brown* (1978) 80 Cal.App.3d 297, 303 [145 Cal.Rptr. 483]). The furtherance of these policies is a legitimate legislative purpose. **(1b)** However, as in *In re Lisa R., supra*, 13 Cal.3d 636, those policies are not furthered by applying the presumption in this case.

In *In re Lisa R.*, a natural father was denied the opportunity to offer evidence of his paternity by section 661 (repealed in 1975), which created a conclusive presumption of legitimacy of a child born to a married woman. The defendants there argued the presumption was supported by the same policies asserted by

defendants here. The California Supreme Court rejected the argument and found application of the presumption was a denial of due process because, under the facts of that case, the presumption did not achieve any of its objectives: (1) no family unit was promoted because there was no longer any such unit existing (the mother and presumed father of the child had both died); (2) there was no danger of a stigma of illegitimacy because a natural father seeking to establish his paternity would undoubtedly legitimatize the child; and (3) the presumption did not insure provision of support for the child, but, to the contrary, prohibited the natural father from voluntarily assuming the support obligation. The facts here are close to those of *In re Lisa R.* There is no family unit to protect because Judith and Ronald W. are now divorced. Although in some cases a family unit involving a parent and the child might survive a divorce and warrant protection from a paternity claim by a third party, that is not the case here. Recognizing Donald R. as Michelle's natural father will not only disrupt no marriage but will also promote the parent-child relationship which now exists as Donald R. occupies the father role in Michelle's home. As to the legitimacy and support purposes, these factors relate to protection of the child and thus do not justify prohibiting an action brought on behalf of the child herself. Furthermore, in this case there is no danger of illegitimacy or nonsupport as the man Michelle asserts is her natural father has voluntarily assumed the father role in her home. Application of an irrebuttable presumption of legitimacy here violates due process because it is not an appropriate means for achieving the intended ends of the legislation; none of the purposes of the presumption are achieved by its application here.

**[139 Cal.App.3d 29]**

Several recent cases have found the application of a conclusive presumption of legitimacy is not a violation of due process (*Ferguson v. Ferguson* (1981) 126 Cal.App.3d 744 [179 Cal.Rptr. 108]; *In re Marriage of B., supra*, 124 Cal.App.3d 524; *County of San Diego v. Brown, supra*, 80 Cal.App.3d 297). We find no fault

with the reasoning of those decisions but instead deal with facts not involved in those cases. In *Brown* and *Marriage of B.*, presumed fathers were being sued to enforce their support obligations; applications of the presumption of legitimacy furthered the policy of insuring private support for the children. In *Ferguson*, the alleged putative father denied his paternity and the court could not assume he would voluntarily legitimatize the child, as is the case here. The constitutional flaw in section 621 does not appear on its face but rather in its application in those cases where, as here, it does not further its underlying policies.

Denying Michelle the opportunity to rebut the presumption Ronald W. is her natural father also violates her rights under the equal protection clause. **(3)** Whenever a statute distinguishes between two classes of people and deprives one of the classes of a fundamental right, it is constitutional only if it is necessary in order to further a compelling state interest (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 17 [112 Cal.Rptr. 786, 520 P.2d 10]; *In re Terry D.* (1978) 83 Cal.App.3d 890, 895 [148 Cal.Rptr. 221]). **(1c)** Section 621 allows mothers and presumed fathers to rebut the presumption of legitimacy but denies that opportunity to the child. This distinction deprives one of the classes whose interest is at stake, the children, of a fundamental right. The right of a child to establish a relationship with a parent "is the most fundamental right a child possesses [and can] be equated in importance with personal liberty and the most basic of constitutional rights." (*Ruddock v. Ohls* (1979) 91 Cal.App.3d 271, 277-278 [154 Cal.Rptr. 87].) Therefore, section 621 violates the equal protection clause unless it can withstand the test of strict scrutiny. As we have already pointed out, under the facts of this case, no state interest is served by application of the presumption of legitimacy here. It follows the presumption is not necessary to further a compelling state purpose. As applied in this case, section 621 deprives Michelle of equal protection under the law.

As we stated above, we do not hold a child cannot be conclusively presumed legitimate in any case. Nor do we hold the right to rebut such a presumption cannot be made subject to a statute of limitations; other policies not discussed here support the imposi-

tion of a limitation. (See *In re Marriage of B., supra*, 124 Cal.App. 3d 524, 532.) However, where, as here, the presumption denies the child all rights to establish a relationship with a natural parent and does not protect the integrity of a family unit or the best interests of the child, it violates both the equal protection and due process clauses of the United States Constitution.

**[139 Cal.App.3d 30]**

The judgment is reversed.

Cologne, J., and Work, J., concurred.

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

| | |
|---|---|
| MICHELLE MARIE WATKINS, a minor, by and through her Guardian Ad Litem, VERLE WILLIAMS, and DONALD MICHAEL RILEY,<br><br>Plaintiffs,<br><br>vs.<br><br>JUDITH ANNE RILEY, and RONALD BEARLEY WATKINS,<br><br>Defendants. | Case No. 467492<br><br>MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT<br><br>DATE: 6/4/81<br>TIME: 8:30 a.m.<br>DEPT: 18 |

I

## STATEMENT OF THE FACTS

Defendants, JUDITH ANNE RILEY and RONALD BEARLEY WATKINS, were married on or about May 7, 1965. In 1973, Mrs. Riley met her present husband, plaintiff, DONALD MICHAEL RILEY, during a period when she was experiencing marital difficulties with defendant WATKINS which led to their subsequent dissolution. From on or about September 29, 1973, until the present, Mr. and Mrs. Riley have regularly engaged in sexual

relations. As a result, on or about January 17, 1974, the minor plaintiff MICHELLE MARIE WATKINS was conceived.

Between April of 1969 and September of 1973, Mr. Watkins and Mrs. Riley employed no method of birth control. Mrs. Riley was later able to determine that her inability to conceive during this period of time was due to the fact that Mr. Watkins was sterile. This fact had concerned Mrs. Riley, and in December of 1972, she visited her doctor to have her fallopian tubes examined for possible obstructions and to otherwise determine if there was any physiological reason for her inability to conceive. Mrs. Riley was assured by her doctor that she was physically capable of conception.

Subsequent to September of 1973 and prior to the time that the minor child was conceived, Mrs. Riley and Mr. Watkins essentially ceased having sexual relations, although they were still technically married. Subsequent to discovering she was pregnant, Mrs. Riley reconstructed on her calendar the days on which she had engaged in sexual intercourse with Mr. Watkins. In doing so she could positively establish that during the time that ovulation occurred, she had engaged in sexual relations solely with Mr. Riley. Thus, Mrs. Riley was able to determine that Mr. Riley was the child's father. Consequently, when the minor child was approximately 18 months old, Mrs. Riley requested a friend to inform Mr. Watkins that Mr. Riley was the biological father of the minor child.

Mrs. Riley and Mr. Watkins permanently separated in or about November of 1978, and their marriage was dissolved by Final Judgment on September 4, 1979. Subsequently, on November 15, 1980, Mrs. Riley married the father of the minor child, Mr. Riley. Since this marriage, Mr. Riley has taken the child into his home, and he openly holds her out to be his natural child.

The issue of the parentage of the minor child was not raised during the dissolution proceedings because of the sensitive nature of

her conception. However, it is imperative for inheritance and other reasons to have paternity determined conclusively.

II

**INTRODUCTION**

The purpose of a motion for summary judgment is to establish whether or not a lawsuit contains triable issues of fact. *Pasadena City Fire Fighters Assn. v. Board of Directors*, 36 Cal.App.3d 901, 906 (2d Dist. 1974). Such a motion should, therefore, only be granted if all the admissible evidence contained in the declarations submitted by the parties, shows that there is no triable issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Calva Products v. Security Pacific Nat. Bank*, 111 Cal.App.3d 409, 415 (4th Dist. 1980). In making this determination, "the affidavits and declarations of the moving party are strictly construed and those of his opponent, even if in conclusionary terms, are liberally construed." *Gray v. Reaves*, 76 Cal.App.3d 567, 573 (4th Dist. 1977).

Summary judgment is a drastic measure which should be employed with caution so that it does not become a substitute for the open trial method of determining facts. *Varco-Pruden, Inc. v. Hampshire Constr. Co.*, 50 Cal.App.3d 654, 659 (1st Dist. 1975). Accordingly, any doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. *Bunzel v. American Academy of Orthopaedic Surgeons*, 107 Cal.App.3d 165, 169 (2d Dist. 1980).

> It is, of course, elementary that the motion for summary judgment should be denied if the papers submitted show there is a triable issue of fact . . . . and if an issue of fact is present the trial court abuses its discretion in granting such a motion. *Black v. Sullivan*, 48 Cal.App.3d 557, 567 (5th Dist. 1975).

## III

## ARGUMENT

### A. EVIDENCE CODE SECTION 621 HAS BEEN AMENDED AND IS NO LONGER CONCLUSIVE.

Evidence Code Section 621 only applies to a husband and wife and therefore is inapplicable to the case at bar. Even assuming it were applicable, however, defendant WATKINS, only accurately quotes Evidence Code §621 *as it read* prior to September 30, 1980. However, as of this date, Section 621 is no longer conclusive and now provides as follows:

> (a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.
>
> (b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly . . . .

Consequently, the presumption established by Section 621 may now be rebutted based upon blood tests performed pursuant to the Uniform Act on Blood Tests to Determine Paternity. In view of the fact that defendant's Memorandum of Points and Authorities is comprised solely of the superseded code section, and cases decided under that section, it has no application to the instant action. Accordingly, plaintiffs request that the Motion for Summary Judgment be denied.

## B. EVIDENCE CODE SECTION 621 IS INAPPLICABLE UNDER THE FACTS OF THIS CASE.

### 1. Certain facts, not present in the instant action, must be proven before Evidence Code Section 621 may be applied.

Assuming, arguendo, that Evidence Code Section 621 applies to this case, this section, by its terms, does not apply until the proponent establishes the following preliminary facts; (1) that the child is the issue of a wife cohabiting with her husband, and (2) that the husband was not impotent or sterile at the time of conception. In the instant action the second factor is disputed. According to the declarations filed on plaintiffs' behalf, Mr. Watkins was sterile at the time of conception. Thus, a triable issue of material fact exists, and it would be error to grant a motion for summary judgment under the circumstances. *See, Black v. Sullivan, supra*, 48 Cal.App.3d at 567. Additionally, even if there was no dispute with regard to the issue of sterility, Section 621 could not constitutionally be applied to the instant action.

### 2. The application of Evidence Code Section 621 to the instant action would violate due process and equal protection guarantees of the United States Constitution.

Prior to September 30, 1980, Evidence Code Section 621, and its predecessor statutes, purported to establish a conclusive presumption as between a husband and wife only. Upon review, however, it was determined that a conclusive presumption of paternity could not always be constitutionally applied to a given case. In this regard, the California Supreme Court has stated:

> As our discussions have indicated, the reasonableness of a statutory limitation on the right to offer proof of parentage depends on circumstances prevailing in each particular case. Accordingly, a court, before receiving evidence thereof, must in

> each instance make a preliminary determination, as by offer of proof, that due process concepts would be offended if the particular claimant to parentage were denied an opportunity to prove his claim. *In re Lisa R.*, 13 Cal.3d 636, 651 n. 17 (1975).

Accordingly, plaintiffs submit that in the instant action due process, as well as equal protection, concepts would be offended if plaintiffs were denied an opportunity to present evidence on the issue of paternity.

Generally, conclusive presumptions are constitutionally suspect and disfavored under the due process clause of the United States Constitution. *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). Consequently, it has been held that a conclusive presumption violates due process if (a) the presumed facts are not universally true; (b) reasonable alternative means exist to determine actual facts; and (c) the presumption affects an important right or one enjoying constitutionally protected status. *Id.* at 452. Initially it should be noted that it is not universally true that a child born to a wife cohabiting with her husband, who is not impotent or sterile, is an issue of the marrige. In this regard, "[t]he court is not required to be unaware of the prevalence of nonmarital and extramarital relationships in today's society." *Ruddock v. Ohls*, 91 Cal.App.3d 271, 278 (5th Dist. 1979).

Moreover, reasonable alternative means exist to determine the actual fact of paternity. California courts have long held that blood tests may be used to prove nonpaternity. *Jackson v. Jackson*, 67 Cal.2d 245, 248 (1967). In the past, three tests, the ABO, Rh, and MN, have been characterized as the standard blood grouping systems. *Huntington v. Crowley*, 64 Cal.2d 647, 653 (1966).

Recently, the Fourth District acknowledged scientific advances in the area and held that the Human Leucocyte Antigen (HLA) tissue typing test is admissible to prove probability, assuming that

the test is generally accepted in the medical community. *Cramer v. Morrison*, 88 Cal.App.3d 873, 883 (4th Dist. 1979). *Cramer* is significant in that (1) it expanded blood testing to include white cell analysis in addition to the standard red cell tests, and (2) it permitted evidence of paternity probability in an area previously limited to paternity exclusion.

The reliability of blood tests as a method of establishing paternity is further supported by the fact that California has adopted the Uniform Act on Blood Tests to Establish Paternity. Evidence Code §§890-97. Moreover, blood tests are permissible whenever a blood relationship of the parties is in controversy [Code of Civil Procedure §2032], and the Uniform Parentage Act [Civil Code §§7000-21] contemplates blood tests as an appropriate mechanism for establishing paternity. The fact that judges and juries throughout the state have, for years, made daily determinations, with respect to paternity, based on blood test evidence establishes that such tests constitute a reasonable alternative means for determining the actual fact of paternity.

Concerning the third prong of the test for determining constitutionality of a conclusive presumption, it is beyond dispute that the establishment of the parent-child relationship is an "important right." With regard to a child's right to bring an action to establish paternity, it has been stated that, "the establishment of the parent-child relationship is the most fundamental right a child possesses." *Ernest P. v. Superior Court*, 111 Cal.App.3d 234, 237 (4th Dist. 1980). This right "is to be equated in importance with personal liberty and the most basic of constitutional rights." *Ruddock v. Ohls*, 91 Cal.App.3d 371, 378 (5th Dist. 1979). In fact it is the "most fundamental right next to life itself." *Id.*

A corresponding right has been recognized to exist in a biological parent regardless of his or her marital status. Even "in an era of changing lifestyles accompanied by an unfortunate decline in, or lack of acceptance of, the traditional family unit, our courts have nonetheless recognized and protected one of the most

basic civil rights--the interest of a parent in his or her minor child." *In re Kelvin M.*, 77 Cal.App.3d 396, 400 (1st Dist. 1978). The natural father and mother possess this fundamental right which constitutes a private interest to be given sacrosanct protection.

> The private interest here, that of a man and the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody and management of his or her children 'come[s] to this Court with a momentum for respect . . . .'
>
> The court has frequently emphasized the importance of the family. *The rights to* conceive and *to raise one's children have been deemed 'essential,' Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and *[r]ights far more precious . . . than property rights,' May v. Anderson*, 345 U.S. 528, 533 (1953). *It is cardinal with us that custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the due process clause of the Fourth Amendment, *Meyer v. Nebraska, supra*, at 399, [and] the equal protection clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, 405 U.S. 645, 649, 658 (1972) [emphasis added], *quoted in In re Kelvin M., supra*, 77 Cal.App.3d at 400-401.

In short, "the interest of an unwed father in his children is not

only cognizable but also of sufficient substance to warrant deference except when the deprivation comports with equal protection and due process requirements." *In re Lisa R.*, 13 Cal.3d 636, 648 (1975).

In view of the foregoing, plaintiffs submit that Evidence Code Section 621 cannot be constitutionally applied to prevent plaintiffs from introducing evidence on the issue of paternity even if it were held to apply to parties other than a husband and wife. The application of a conclusive presumption to the facts of this case would violate due process in that (a) the presumed facts are not universally true; (b) reasonable alternative means exist to determine actual facts; and (c) the presumption affects an important right or one enjoying constitutionally protected status. In addition to being violative of due process, a ruling preventing plaintiffs from introducing evidence on the issue of paternity would violate principles of equal protection.

The principles governing equal protection analysis were summarized by the court in *In re Terry D.*, 83 Cal.App.3d 890, 895 (3d Dist. 1978), as follows:

> There are two standards of review applied by the courts in equal protection questions. The first or conventional standard requires only that different treatment of classes of individuals has some "reasonable basis" or bears "'some rational relationship to conceivable legitimate state purpose.'" [Citations.] A second test or standard has been developed by the courts to be applied to a classification drawn along lines which rendered it "suspect" in constitutional terms or which touched a "fundamental interest." These are generally matters such as race, sex or "rights explicitly or implicitly guaranteed by the constitution." [Citations.] In such case strict scrutiny is required and the state bears a burden of establishing that it has a

> "compelling interest" which justified the law and that the classification is necessary to further that purpose or interest.

In light of the foregoing, Evidence Code Section 621 cannot be interpreted to allow only the husband to rebut the presumption of paternity. Such a holding would create an unacceptable classification treating husbands differently from natural fathers and children.

As discussed previously, the right to the establishment of the parent and child relationship is fundamental. In view of this, any classification affecting this right should be subject to strict scrutiny requiring the state to demonstrate a compelling interest. However, plaintiffs submit, that under the facts of this case such a classification does not even bear a rational relationship to a legitimate state interest.

Various policy considerations have been cited in favor of a conclusive presumption of paternity. In this regard it has been held:

> The purpose underlying the statutory presumption of conclusiveness does not imply a legislative doubt as to the scientific reliability of blood tests but rather the purpose is to determine the legal father, to achieve certain social policies upholding the integrity of the family [citation], to protect the child from the stigma of illegitimacy [citation], or to protect the child's welfare and to give the father a child and to keep the child off the state's welfare roll. *County of San Diego v. Brown*, 80 Cal.App.3d 297, 303 (4th Dist. 1978).

None of the foregoing policy considerations are furthered by permitting the husband to rebut the presumption of his paternity while denying this right to the natural father and the child. It cannot rationally be said that it is in the best interest of a child to deny

him the opportunity to establish a parent-child relationship with his natural father. Nor can it be said that permitting a husband to deny paternity while denying the natural father a right to assert his paternity will "keep the child off the state's welfare roll." Additionally, the state's interest in relieving a child of the stigma of illegitimacy does not warrant the conclusive application of the presumption in that a natural father seeking to establish his paternity would undoubtedly intend to legitimize the child as his own. *In re Lisa R., supra*, 13 Cal.3d at 650. Moreover, although a state may have a legitimate interest in promoting marriage, and in furtherance of that policy in not impugning a family unit, that policy cannot be served when the family unit has been dissolved. *Id.*

In short there is no rational basis for permitting a husband to rebut the presumption of paternity while preventing a natural father and child from contesting a husband's paternity. Such a rule would be arbitrary and capricious, and would violate both due process and equal protection concepts. Plaintiffs, therefore, submit that there is a triable issue of material fact with regard to paternity, and that the Motion for Summary Judgment should be denied on this ground.

**3. Evidence Code Section 621 acts as a bar only to a husband and wife.**

With regard to paternity actions, it has specifically been held that, "[t]he issue of paternity determined in a marital dissolution action is not binding upon the child unless joined as a party." *Ruddock v. Ohls, supra*, 91 Cal.App.3d at 385. The rationale behind the foregoing rule was explained by the court as follows:

> [T]he establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights. To hold a child bound prospectively by a finding in a divorce action in which the child was not a party

> would be to allow the conduct of the mother to foreclose the most fundamental right a child possesses in our system of jurisprudence.
>
> Considering present-day realities, not every question of paternity raised and decided in a marital dissolution action involves a full adversary hearing on the subject. It is not uncommon for such an issue raised in the pleadings to be decided pro forma because the mother is reticent to be subjected to scrutiny about past dalliances. The emotional experience and psychological trauma of having one's personal life unveiled can act as a deterrent. Guilt feelings over the dissolution, favorable concessions on support or property can influence the vigor with which the paternity question is presented to the court . . . .
>
> We hold that in dealing with the prospective rights of a minor child to establish paternity, the child, if not formally a party, is not bound by a paternity determination in a marital dissolution action . . . . To bind the child by the discretion or indiscretion, as the case may be, of the mother in choosing counsel or trial tactics in a divorce action without formal joinder, is to confer upon the mother the right to determine a child's most fundamental right next to life itself. *Id.* at 277-78.

In accordance with the foregoing, it has been held that a child's right to determine paternity survives a judicial determination of paternity in a dissolution action between the child's mother and her husband.

IV

## CONCLUSION

In light of the foregoing, plaintiffs submit that Evidence Code Section 621 does not operate to bar the instant action. As a result, a triable issue of material fact exists. Plaintiffs, therefore, respectfully request that the Motion for Summary Judgment be denied.

Dated: _____

Respectfully submitted:

SHEELA, LIGHTNER & CASTRO
Attorneys for Plaintiffs

By: _____
Bruce M. Beals

SUPREME COURT
FILED
OCT 22 1985
Laurence P. Gill, Clerk
DEPUTY

THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHELLE MARIE W., a Minor, by and through her Guardian Ad Litem, VERLE WILLIAMS, and DONALD MICHAEL RILEY,

Appellants,

v.

JUDITH ANNE RILEY and RONALD BEARLEY W.,

Appellees.

Supreme Court No. L.A. 31758

Superior Court No. 467492

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Michelle Marie W. and Donald Michael Riley, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, affirming the dismissal of the complaint, entered in this action on August 5, 1985.

This appeal is taken pursuant to 28 U.S.C. sec. 1257(2).

Bruce M. Beals
Counsel for Appellants

## AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA )
) ss.
County of San Diego )

KATHRYN JOHNSTON, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of San Diego County, California; that her business address is 3104 Fourth Avenue, San Diego, California; that she is over the age of eighteen years and not a party to the within action.

That on October 10, 1985, she deposited in the United States mail at San Diego, California, the Notice of Appeal To The Supreme Court Of The United States in an envelope bearing the requisite postage, addressed to:

Office of the Attorney General
110 W. "A" Street
Suite 700
San Diego, CA 92101

Lance B. Wickman
Attorney at Law
701 B Street, Suite 2100
San Diego, CA 92101

Judith A. Riley
14005 Davenport Avenue
San Diego, CA 92129

at which places there are delivery services by United States mails from said post office.

Kathryn Johnston
KATHRYN JOHNSTON

Subscribed and sworn to before me this 21st day of October, 1985.

OFFICIAL SEAL
PATTY F EVANS
NOTARY PUBLIC CALIFORNIA
SAN DIEGO COUNTY
MY COMM. EXP. AUG. 29, 1989

Patty F Evans
Notary Public in and for said County and State